IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 400

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

On Appeal From the Supreme Court of Pennsylvania

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	3
Questions Presented	3
Statement of the Case	4
(1) History of the Case	5
(a) The Operating Agreement	5
(b) Car Service and Per Diem Agreement	7
(2) Business Offices—Operations—Qualification	9
(3) Profit Under Car Service and Per Diem Agreement	10
(4) Apportionment Under Tax Practice	10
(5) Appellant's Contention and the Rulings of the State Court	10
Introduction to Argument	12
Summary of Argument	14
Argument	21
I. An Average Number of Appellant's Freight Cars Used Under the Operating Agreement and Under the Car Service and Per Diem Agreement Acquired a Situs Outside of Pennsylvania or Were Used Habitually and Continuously in Pennsylvania and in Other States; And, Therefore, the Unapportioned Property Tax Assessed Thereon by Pennsylvania Violates the Due Process Provisions, and the Commerce Clause, of the Federal Constitution	21

TABLE OF CONTENTS (Continued)

Page

A. General Tangible Property Rules and Principles 21

B. Average Unit Apportionment Rule and Related Principles 23

C. The Average Unit Apportionment Rule in its Application to Property Taxation by a Domiciliary State Has Been Refined and Extended . 27

D. Application of Settled Legal Principles As Discussed to the Facts in the Instant Case 28

(1) Appellant and its fleet of freight cars constitute a component part of an integrated, interstate railroad system 28

(2) Appellant's freight cars run on fixed routes and regular schedules 29

(3) Freight cars, not run on fixed routes and regular schedules, but run regularly, habitually and continuously on lines of other railroads in and out of Pennsylvania 31

II. Appellant is Discriminated Against When Tax Apportionment is Denied to it But is Allowed to Other Railroads for Freight Cars While on the Lines of Using Railroads Outside of Pennsylvania Under the Car Service and Per Diem Agreement .. 39

III. The Questions Presented Should be Adjudicated by the Court 40

IV. Conclusion 42

Appendix A—Text of Pennsylvania Statute Involved . 44

Section 20 of the Act of June 1, 1889, P.L. 420, as Amended by the Act of May 16, 1945, P.L. 606, 72 Purdon's Pennsylvania Statutes § 1901 44

TABLE OF CONTENTS (Continued)

Page

Section 21(a) of the Act of June 1, 1889, P.L. 420, as Amended by the Act of May 29, 1951, P.L. 462, 72 Purdon's Pennsylvania Statutes § 1871 45

Section 1 of the Act of June 22, 1931, P.L. 685, 72 Purdon's Pennsylvania Statutes § 1896 45

APPENDIX B—Average Cars and Average Value Thereof on Railroad Lines In and Outside, or Outside, Pennsylvania, Where Car Days Exceed 4000 on Each Line **46**

TABLE OF CASES CITED

Page

American Refrigerator Transit Co. v. Hall, 174 U.S. 70, 19 S. Ct. 599 (1899) 13, 19, 24, 25, 30, 32, 39, 41

Arco Auto Carriers, Inc. v. Bennett (Arkansas), 341 S.W. 2d 15 (1960) Reh. den. January 9, 1961 ..... 32, 41

Atchison, Topeka and Santa Fe Railroad Co. v. Matthews, 174 U.S. 96, 19 S. Ct. 609 (1899) 40

Ayer & Lord Tie v. Kentucky, 202 U.S. 409, 26 S. Ct. 679 (1906) 16, 22

Braniff Airways Inc. v. Nebraska State Board, 347 U.S. 590, 74 S. Ct. 757 (1954) 11, 13, 17, 18, 19, 25, 26, 29, 35, 36, 37, 41

Com. v. Delaware, Lackawanna & Western Railroad Co., 145 Pa. 96, 22 A. 157 (1891) 3, 12, 31

Com. of Kentucky v. Union Pacific Railroad Co., 214 Ky. 339, 283 S.W. 119 (1926) 41

Delaware, Lackawanna & Western Railroad Co. v. Pennsylvania, 198 U.S. 341, 25 S. Ct. 669 (1905) 3, 12, 16, 22

Flying Tiger Lines Inc. v. County of Los Angeles (Cal.), 333 P. 2d 323 (1958), cert. den. 359 U.S. 1001 ..... 17, 25, 26, 27, 32, 34, 36, 41

Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158, 54 S. Ct. 152 (1933) 12, 13, 23, 25, 32, 41

Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 60 S. Ct. 968 (1940) 29, 31

New York Central and Hudson River Railroad Co. v. Miller, 202 U.S. 584, 26 S. Ct. 714 (1906) 11, 13, 18, 36, 37, 40, 41

TABLE OF CASES CITED (Continued)

Page

Northwest Airlines Inc. v. Minnesota, 322 U.S. 292, 293, 64 S. Ct. 950 (1944) 12, 13, 19, 27, 32, 34, 36, 38

Oklahoma Tax Commission v. American Refrigerator Transit Co., Sup. Ct. of Okla., 349 P. 2d 746 (12 22 59) 19, 32, 33, 39, 41

Old Dominion Steamship Co. v. Virginia, 198 U.S. 299, 25 S. Ct. 686 (1905) 16, 22

Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 S. Ct. 432 (1949) ..11, 13, 17, 21, 25, 26, 32, 35, 37, 41

Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S. Ct. 876 (1891) .....
.....13, 23, 24, 25, 29, 30, 37, 39, 41

Scandinavian Airlines System Inc. v. County of Los Angeles (Cal.) Dist. Ct. of Appeals (2nd App. Dist. Div. 2), 6 West's California Reporter 694, 183 Adv. Cal. App. Reports 69 (1960); Modified by S. Ct. of Cal. (5-29-61)# 23, 27, 28, 32, 34

Senior v. Braden, 295 U.S. 422, 55 S. Ct. 800 (1935) ... 21

Southern Pacific Co. v. Kentucky, 222 U.S. 63, 75; 32 S. Ct. 13 (1911) 16, 22

Standard Oil Co. v. Peck, 342 U.S. 382, 72 S. Ct. 309 (1952) .....
.....11, 13, 17, 19, 21, 25, 26, 27, 30, 32, 34, 35, 36, 37, 41

Taylor v. Fee, 223 F. 2d 251, affirmed 353 U.S. 553, 77 S. Ct. 1037 (1956) 29

Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 S. Ct. 36 (1905) .....
.....13, 17, 21, 24, 25, 27, 30, 32, 34, 35, 37, 41

Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149, 20 S. Ct. 631 (1900) 13, 41

#14 Cal. 25, cert. den. Nov 9, 1961, S Ct. Docket No. 354.

TABLE OF CASES CITED (Continued)

Page

Union Tank Line Co. v. Wright, 249 U.S. 275, 39 S. Ct. 276 (1919) 24

U.S. v. Pennsylvania R. Co., 323 U.S. 612, 65 S. Ct. 471 (1945) 29

STATUTES AND AUTHORITIES CITED

Act of June 1, 1889, P.L. 420, Sections 20 and 21(a) as Amended, 72 Purdon's Pennsylvania Statutes, §§ 1871, 1901 ..... 2, 12

Act of June 22, 1931, P.L. 685, Section 1, 72 Purdon's Pennsylvania Statutes, § 1896 3

A.L.R. Vol. 49, 1103 41

Interstate Commerce Act of 1920, as amended, 49 U.S.C.A., § 1, Pars. 4, 9-14 ..... 7, 28, 29, 31

U.S.C. Vol. 28, §§ 1257(2) and (3), 2103 2

U.S. Constitution:

Article I, Section 8, Clause 3 ...4, 11, 12, 19, 30, 35, 38

Fourteenth Amendment—Due Process 4, 11, 12, 19, 30, 35, 38

Fourteenth Amendment—Equal Protection 4, 12, 19, 39, 40

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BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (R. 209-216) is reported at 403 Pa. 419, 169 A. 2d 878. The opinion of the Trial Court entering judgment *nisi* (R. 180a-187a) is reported in 71 Dauphin County Reporter 348. The Trial Court's opinion overruling exceptions (R. 204a, 205a) is not included in the Official Reporter.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered April 17, 1961 (R. 209, 216); and appellant's Petition for Reargument was denied on May 25, 1961 (R. 239). Notice of Appeal to this Court was filed in the Supreme Court of Pennsylvania on July 14, 1961 (R. 240, 241). The jurisdiction of this Court rests on 28 U.S.C. 1257 (2) and (3) and 2103.

STATUTE INVOLVED

The validity of Sections 20 and 21(a) of the Act of June 1, 1889, Pamphlet Laws 420, as amended, as of the tax year involved in this case (72 Purdon's Pennsylvania Statutes, Sections 1871 and 1901), as construed by the Supreme Court of Pennsylvania, is involved (Appendix A).

Section 20 requires Pennsylvania Corporations to make an annual report to the Department of Revenue on a form prescribed by that Department and to include therein, *inter alia:*

> "Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and the value of the same; and the value of the property, if any, exempt from taxation.
>
> "Sixth. A valuation and appraisal * * * of the capital stock of the said corporation * * * at its actual value in cash as it existed at the close of the year for which the report is made."

Section 21(a) provides:

> "That every domestic corporation * * * from which a report is required under the twentieth section hereof, shall be subject to, * * * a tax at the rate of five mills upon the actual value of its whole capital stock of all kinds,* * * as ascertained in the manner prescribed in the said twentieth section: * * *."

The nature of the tax is not in dispute. It has conclusively been held, without dissent, to be a tax on property and assets of Pennsylvania Corporations as represented by capital stock value. It has been before this Court in a prior case and has been construed as not intending to reach property located or having a situs outside of the Commonwealth.[1]

The Act of June 22, 1931, Pamphlet Laws 685 (Appendix A) prescribes the formula to be used to exclude non-taxable and exempt assets, such as tangible property having a situs outside the state and United States securities. The amount of such assets is deducted from total assets. The ratio of the remaining assets to total assets is applied to the whole capital stock value.

In the instant case on appeal, there is involved the issue of exclusion of the following assets which appellant contends had a situs outside of, or were substantially absent from, and used outside of, the domiciliary state and, therefore, were beyond its taxing power and jurisdiction:

$525,765.71—Average of 158 freight cars run on fixed routes and regular schedules over railroad lines outside of Pennsylvania (Stipulation of Facts, Par. 14, R. 50a and Exhibits Y-2 and Y-5, R. 131a, 134a).

$7,282,523.00—Average of 2189.23 freight cars run regularly, habitually and continuously on the lines of *other* railroads outside of Pennsylvania (S. F. Pars. 13, 15 and 16, R. 49a, 50a, 51a and Exhibits Y-2, Y-3, Y-4, Y-5 and Z, R. 131a-143a, 154a).

QUESTIONS PRESENTED

1. Did an average number of appellant's freight cars run under an Operating Agreement on fixed routes and regular

[1] *Delaware, Lackawanna & Western Railroad Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905); *Commonwealth v. Delaware, Lackawanna & Western R. R. Co.*, 145 Pa. 96, 22 A. 157 (1891).

schedules over railroad lines to and from Pennsylvania, the domiciliary State and did an average number of its freight cars run habitually, regularly and continuously on railroad lines to and from, or wholly outside, such state, under a Car Service and Per Diem Agreement, obtain a permanent situs outside the domiciliary state; and, if so, does the unapportioned tax thereon violate the due process provisions, and the Commerce Clause, of the Federal Constitution?

2. Does the unapportioned property tax violate the equal protection of the laws provisions of the Federal Constitution when apportionment is denied to appellant, having no trackage outside the state, and is allowed to other railroads with trackage in and out of the state, for freight cars while on the lines of using railroads outside of Pennsylvania under a Car Service and Per Diem Agreement?

STATEMENT OF THE CASE

The Pennsylvania Department of Revenue assessed the unapportioned capital stock or property tax for the year 1951 (1) on appellant's diesel locomotives and freight cars run on fixed routes and regular schedules over railroad lines to and from the state and (2) on freight cars run habitually, regularly and continuously on railroad lines to and from, or wholly outside, the state. (S F, Pars. 20, 21, R. 53a, 54a, Exhibit BB, R. 158a, 10a, 11a). Appellant challenged the assessment (R. 3a-7a) under the due process clause of the Fourteenth Amendment of the Federal Constitution on the ground that an average number of diesel locomotives and freight cars had their situs outside of Pennsylvania, the domiciliary state, or were continuously absent from and habitually employed outside the state and hence that the state did not have jurisdiction to tax them; and under the Commerce Clause of the Federal Constitution, on the ground that such average number was exposed to multiple state taxation. The Trial Court sustained the assess-

ment (R. 187a, 205a). The Supreme Court of Pennsylvania reversed the Trial Court and modified the assessment on diesel locomotives (R. 215, 216) but affirmed the Trial Court and sustained the assessment on freight cars (R. 216). The appeal to this Court is limited only to the unapportioned tax assessment on appellant's freight cars.

(1) History of the Case

The facts in the Record have been stipulated by the parties (Stipulation of Facts, Commonwealth's Exhibit No. 8, R. 38a-57a and Exhibits attached thereto, R. 58a-161a).

Appellant, a Pennsylvania Corporation, was incorporated in 1914 for the purpose of "constructing, maintaining and operating a railroad for public use in conveyance of persons and property" (S/F, Par. 2, R. 38a). All of its capital stock was owned by The Central Railroad Company of New Jersey Corporation, hereinafter referred to as CNJ (S/F, Par. 3, R. 38a).

The railroad operated by appellant extended from the anthracite region in Pennsylvania (Scranton and Wilkes-Barre) to the Pennsylvania-New Jersey border at Easton (Pa.) where it connected with the railroad lines operated by CNJ to Jersey City and points along the North Jersey Coast. Appellant's total mileage (owned and leased—all in Pa.) was 206.74: 123.47 main line and 83.27 branch (S/F, Par. 4, R. 38a).

There are two separate and distinct types of use of appellant's railroad equipment in the instant case, the one under the Operating Agreement between appellant and CNJ and the other under the Car Service and Per Diem Agreement of the Association of American Railroads.

(a) The Operating Agreement

Prior to August 5, 1946, CNJ operated its railroad lines in New Jersey and it operated, *also*, under lease or sub-lease

the railroad lines from Easton to Scranton and Wilkes-Barre in Pennsylvania. On August 5, 1946, appellant, with the consent of the Interstate Commerce Commission (I.C.C.), terminated the leases and subleases to CNJ of the railroad lines in Pennsylvania and took over their operation in Pennsylvania, and the parties (Appellant and CNJ) entered into an Operating Agreement *in order to continue the existing through freight and passenger service over their respective lines*. This Agreement provided that each party "shall operate such through service" over their respective lines; that "each party shall furnish its fair share of locomotives and other equipment necessary to operate such service"; and that "whenever in such through service any locomotive or unit of other equipment of one party shall enter on the line of the other party it shall thereupon be temporarily leased to and operated by such other party until returned to the former's lines" (S. F. Par. 5, R. 38a-40a, Exhibit A, R. 58a-65a).

Pursuant to this Agreement, appellant's diesel locomotives and freight cars, in the course of *through* freight shipments originating on its own lines in Pennsylvania or on the lines of CNJ in New Jersey, were run *on fixed routes and regular schedules* in and out of Pennsylvania over its own lines in Pennsylvania and over the lines of CNJ in New Jersey and, for such use, appellant received a division of freight revenues, a mileage rate for its locomotives, and a per diem rental for its freight cars while on the lines of CNJ (S. F. Pars. 14 and 18, R. 50a, 52a; Exhibit A, Sections 2, 5 and 8, R. 60a, 61a).

The mileage ratio of diesel freight locomotives (30 units) was 56.5523% in Pennsylvania and 43.4477% outside of Pennsylvania; and this mileage ratio applied to the average value of such locomotives results in an apportionment of average value of $1,908,381 or an average of 17 locomotives to Pennsylvania and an average value of $1,466,160 or an average of 13 locomotives outside of Pennsylvania (S. F.

Par. 18, R. 52a; Exhibit Z, R. 145a). This apportionment was allowed in the portion of the decision of the Supreme Court of Pennsylvania *modifying* the judgment of the Trial Court and is not at issue in the instant appeal.

Appellant owned 3074 freight cars during the year 1951, having an aggregate average net book value of $10,225,769 or an average net book value per car of $3,326.53 (S. F. Pars. 15 and 16, R. 50a, 51a; Exhibits Y-2 and Z, R. 131a, 145a). The number of cars times 365 days in the year produces total car days of 1,122,010 for the year. Appellant's freight cars were on the lines of CNJ *under the Operating Agreement* for 57,589 car days (S. F. Par. 15, R. 50a, 51a; Exhibits Y-2 and Y-5, R. 131a, 134a). The average number and value of cars thus run on the lines of CNJ are determined by the ratio of $\frac{57,589}{1,122,010} \times \$10,225,769 = \$525,765.71$ average value divided by $3,326.53 = 158$ average number. *This apportionment was denied by the Supreme Court of Pennsylvania and is at issue in this appeal.*

(b) Car Service and Per Diem Agreement

The Interstate Commerce Act of 1920, as amended, 49 U.S.C.A. Section 1, Pars. 9-14, requires, *inter alia*, railroads to interchange freight and passenger cars in order to provide rapid and efficient through interstate movement of freight and passengers as compared with prior practice of transfer from cars of one railroad to the cars of another.

Appellant is a member of the Association of American Railroads. Under the "Car Service and Per Diem Agreement" entered into by members of the Association pursuant to said Act of 1920, the owning railroad is paid a per diem rate of $1.75 for its freight cars while on the lines of other subscribing members and on the lines of non-subscribing railroads (S. F. Par. 13, R. 49a, 50a; Exhibit X, R. 130a).

It is stipulated by the parties in the instant case that appellant's freight cars, interchanged with subscribing

members under the Agreement, *were habitually, regularly and continuously employed on the lines of such other railroads* operating wholly within Pennsylvania, operating within and without Pennsylvania, and operating wholly without Pennsylvania (8 F, Pars. 13 and 15, R. 49a, 50a, 51a; Exhibits Y-2, Y-3, Y-4 and Y-5, R. 131a-153a).

The car day ratio applied to appellant's total freight cars (3074) produces the following results (8 F, Pars. 13 and 15, R. 49a, 50a; Exhibits Y-2, Y-3, Y-4, Y-5, Y-6, Z, AA-1, AA-2, AA-3 and AA-4, R. 131a-157a):

	Car Days	*Percentage*	*Location of Using Railroad*	*Average Value*	*Number of Units*
(1)	104,479	.0931	Appellant—Pa.	952,186	286.24
(2)	57,689	.0514	CNJ—Out of Pa.	525,766	158.09
(3)	25,321	.0225	Others—All Pa.	230,696	69.47
(4)	386,532	.3445	Others—In and Out Pa.	3,522,762	1,058.99
(4)(a)	135,455	.120725	In Pa.	1,234,475	371.10
(4)(b)	251,077	.2238	Out Pa.	2,288,529	687.96
(5)	547,989	.4884	Others—All out Pa.	4,994,253	1,501.34
	1,122,010	.9999		10,225,063	3,074.04

(1) Regular routes and fixed schedules—Operating Agreement.

(2) Regular routes and fixed schedules—Operating Agreement.

(3) Regular, habitual and continuous use—Car Service and Per Diem Agreement.

(4) (a) and (b) Breakdown of item (4)—Car Service and Per Diem Agreement.

(5) Regular, habitual and continuous use—Car Service and Per Diem Agreement.

At issue also, in the instant appeal is the denial by the Supreme Court of Pennsylvania of apportionment outside of Pennsylvania of average freight cars of 2189.30 (items 4 (b) and 5, average value $7,282,773) on lines of other railroads outside of Pennsylvania under the Car Service and Per Diem Agreement.

There is no direct evidence in the Record establishing the number of car days and the average number of freight cars in specified foreign states. The Record does establish

the name of, and number of car days on, using railroads and whether the using railroad operated wholly in Pennsylvania, in and out of Pennsylvania, or wholly outside of Pennsylvania (S F, Par. 15, R. 50a, 51a; Exhibits Y-3, Y-4 and Y-5, R. 132a-143a); and the proportion of the "road miles" in and out of Pennsylvania of those using railroads operating in and out of Pennsylvania (S F, Par. 15, R. 51a; Exhibit Y-4, R. 133a). The Record establishes further that based on a detailed examination, study and review by appellant of its records and reports made to it by using railroads for the month of March, 1951, 1024 freight cars were *at all times* during that month on roads operating wholly outside of Pennsylvania; 2049 cars were at some time during the month on roads operating within and without Pennsylvania; and 1 car was at all times on roads operating wholly in Pennsylvania; and that in the best opinion and judgment of appellant, such situation represented the average use and employment of its freight cars on the lines of other railroads at all times throughout the year 1951 (S F, Par. 17, R. 51a, 52a).

(2) Business Offices Operations Qualification

Appellant's domiciliary office at Mauch Chunk, Pennsylvania, was relatively insignificant. Under the said Operating Agreement, appellant maintained joint offices and had operating and administrative personnel *with CNJ* at Jersey City, New Jersey and New York City where its nine operating departments, which conducted its railroad operations, were located, and where collections of revenue and disbursement of expenses were made (S F, Pars. 7, 8, 9, 10 and 11, R. 40a-49a; Exhibits A, C to W inc., R. 58a-65a, 67a-129a). Appellant, also, occupied off-line freight offices with CNJ at Albany, Buffalo, Cleveland, Boston, St. Louis, Detroit, Pittsburgh and Wilkes-Barre (S F, Par. 11, R. 49a).

During 1951, appellant was not qualified or authorized to do business in any state other than Pennsylvania; nor did

it pay franchise or property or other taxes to states other than Pennsylvania except in respect to wages of joint employees at Jersey City and New York City (S F, Par. 12, R. 49a).

(3) Profit Under Car Service and Per Diem Agreement

For its freight cars used on the lines of CNJ under the Operating Agreement and for its freight cars used on the lines of other railroads under the Car Service and Per Diem Agreement, appellant received car hire of $100,955.75 (S F, Par. 19, R. 52a, 53a; Exhibit AA-3, R. 148a) and $1,679,723.50 (S F, Par. 19, R. 52a, 53a; Exhibits AA-1, AA-2, AA-3 and AA-4, R. 146a-157a) respectively or aggregate car hire of $1,780,679.25 (S F, Par. 19, R. 52a, 53a). This represents a gross return of 17.6% on appellant's average investment of $10,225,769 in freight cars.

(4) Apportionment Under Tax Practice

In assessing the capital stock or property tax against other domestic railroad corporations whose railroad lines extended beyond the state, the tax was apportioned based upon the ratio of track mileage outside of the state to total track mileage. This apportionment included freight cars used on the lines of other railroads under the Car Service and Per Diem Agreement. Appellant's freight cars were used on the lines of other railroads under the same Agreement under the same circumstances and for the same consideration and in the tax assessed against it for the year 1951 no apportionment on any basis was made for its freight cars so used. (S F, Par. 25, R. 54a, 55a).

(5) Appellant's Contentions and the Rulings of the State Court

Appellant contended that an average number of its diesel locomotives and freight cars run under the Operating

Agreement on fixed routes and regular schedules over the lines of CNJ in New Jersey had acquired a "permanent situs" outside of Pennsylvania; that an average number of its freight cars not run on fixed routes and regular schedules but run habitually, regularly and continuously under the Car Service and Per Diem Agreement on the lines of other railroads outside of Pennsylvania had acquired a "permanent situs" and were continuously absent from Pennsylvania; and that the *unapportioned* property tax assessed thereon violated Due Process and the Commerce Clause.

The Supreme Court of Pennsylvania sustained appellant's contention and reversed the Trial Court in respect to diesel locomotives. It made no distinction between appellant's freight cars run on fixed routes and regular schedules (R. 215) and those that did not. It sustained the unapportioned tax on *all* freight cars on the ground that even though they were run irregularly but continuously on the lines of other railroads in, in and out, or outside of Pennsylvania, and even though an average number may be present in another state (R. 213, 215, 216), they did not acquire a situs apart from appellant's domicile and, therefore, the unapportioned tax thereon did not violate the Due Process provisions, and the Commerce Clause, of the Federal Constitution. In so holding, the state court relied upon a decision of this Court [2] and its burden of proof rule which are no longer applicable to units of transportation equipment habitually employed in several states.[3]

Appellant contended, also, that denial of tax apportionment to it for its freight cars while on the lines of other railroads outside of Pennsylvania under the car service and Per Diem Agreement and *the apportionment of the same tax* on

[2] *New York Central and Hudson River R. R. Co. v. Miller*, 202 U. S. 584, 26 S. Ct. 714 (1906).

[3] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

freight cars of other owning railroads under similar circumstances discriminated against appellant. The Supreme Court of Pennsylvania overruled this contention on the ground that Pennsylvania could make valid classification between appellant whose railroad trackage was wholly in Pennsylvania and other owning railroad companies whose trackage extended beyond Pennsylvania's borders (Opinion, R. 216).

INTRODUCTION TO ARGUMENT

The nature of the tax is not in dispute. Although denominated a capital stock tax, it is construed by the Supreme Court of Pennsylvania as a tax on property and assets of the corporation (Opinion, R. 210). The tax statute excludes from its operation property located or having a situs outside of Pennsylvania (Appendix A, post, p. 44), and it has been so construed.[4]

Since the federal rights asserted by appellant under the Due Process provisions, and the Commerce Clause, of the Federal Constitution turn upon the determination of the question of situs and correlation of the taxing power of Pennsylvania and the several states in which its freight cars are used it is within the province of this Court to analyze the facts in order to apply settled legal principles, if any, to the precise circumstances in the instant case, and thus to ascertain whether the conclusion of the state court denying situs apart from appellant's domicile has adequate support in the evidence.[5]

The Supreme Court of Pennsylvania concluded that because appellant's freight cars were not run on regular routes and fixed schedules (clear error as to those under Operating

[4] *Com. v. Delaware, Lackawanna & Western R. R. Co.*, 145 Pa. 96, 22 A. 157 (1891); *Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905).

[5] *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 159, 54 S. Ct. 152 (1933); *Northwest Airlines Inc. v. Minnesota*, 322 U. S. 292, 293, 64 S. Ct. 950 (1944).

Agreement) and, instead were run irregularly *but continuously* on the lines of other railroads in, in and out, and out of Pennsylvania, they did not acquire a situs outside the state and, therefore, non-domiciliary states did not have the power to levy an apportioned property tax thereon. In reaching this conclusion the state court relied upon the decision of this Court in *New York Central and Hudson River Railroad Co. v. Miller*,[6] and held inapplicable those decisions of this Court requiring tax apportionment both where the units of equipment were run on fixed routes and regular schedules and where they were run irregularly *but continuously* into, through and from the taxing state and other states.[7]

The *Miller* case applied the "home port" vessel rule (domiciliary situs), viz., that units of transportation equipment have their situs at the owner's domicile unless specific units were "continuously without the state during the whole tax year". The *Miller* case and its rule were the basis of this Court's decision in *Northwest Airlines Inc. v. Minnesota*,[8] but, as recognized by the Supreme Court of Pennsylvania in the instant case (R. 215), that decision was later modified or overruled.[9]

[6] 202 U. S. 584, 26 S. Ct. 714 (1906).

[7] Regular routes and fixed schedules:

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 S. Ct. 876 (1891); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

Irregular routes but continuous movement:

American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 26 S. Ct. 36 (1905); *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

[8] 322 U. S. 292, 64 S. Ct. 950 (1944).

[9] Cases cited in Note 3.

The other decisions of this Court cited in Note 7 herein involving units of transportation equipment such as pullman cars, refrigerator and tank cars, boats, barges and vessels operated on inland waters, and airplanes, the doctrine was developed that no one of the states in which the equipment was habitually or continuously employed could tax the entire number of units regardless of their use in other states and required the application of the average unit situs rule of apportionment thereby producing constitutional due process relationship between the tax and opportunities, benefits, or protection conferred or afforded by the laws of the taxing state (domiciliary or non-domiciliary).

The crucial issue in the instant case is which of the two rules is applicable. This entails the determination of the extent of property tax immunity in the home state of units of transportation equipment habitually employed in other states.

There is involved, also, the secondary issue whether the unapportioned assessment on appellant's freight cars discriminates against it when the tax on freight cars owned by other railroads is apportioned under the same circumstances.

SUMMARY OF ARGUMENT

I. An average number of appellant's freight cars acquired a situs outside of Pennsylvania or were habitually and continuously employed in Pennsylvania and other states; and, therefore, the unapportioned property tax assessed thereon by Pennsylvania violates the due process provisions, and the Commerce Clause, of the Federal Constitution.

A. Although its railroad lines lie wholly within Pennsylvania, appellant is engaged substantially in interstate commerce as an originating or terminating carrier; and it is a

component part of the intergrated railroad system in the United States.

1. In providing through freight service under an Operating Agreement with Central Railroad Company of New Jersey (CNJ), it furnishes diesel locomotives and freight cars which are run on fixed routes and regular schedules over its own lines in Pennsylvania and over the lines of CNJ; and for such use, it receives a division of freight revenue and, while on the lines of CNJ, a mileage rate for its locomotives and a per diem rental for its freight cars.

2. To facilitate through freight shipments over its own lines and the lines of other railroads, pursuant to the provisions of the Interstate Commerce Act (49 U.S.C.A. § 1, Pars. 4, 10, 11) it is a subscriber to the Car Service and Per Diem Agreement of the Association of American Railroads under which its interchanges with other railroads at a per diem rental its entire fleet of 3074 freight cars which, to destination of freight shipment and in return to appellant's home road, are run regularly, habitually and continuously over the lines of other railroads in, in and out, and outside of, Pennsylvania.

B. The unapportioned tax assessed by Pennsylvania on the full value of all of appellant's diesel locomotives and freight cars was reversed by the State Court as to diesel locomotives and sustained as to freight cars, no distinction being made between cars used under the two separate and different Agreements. Although denominated a capital stock tax, it is a tax on the property and assets of the corporation (R. 210).

C. Special rules have been developed in the property taxation of migratory tangible property consisting of units of transportation equipment used as vehicles of interstate commerce in *several* states or taxing jurisdictions. The particular rule and concomitant legal principles applicable in the

instant case, as well as the error of the State Court, will be indicated.

1. The general tangible property rule is *not* applicable. Under this rule, the tangible property has a situs at the owner's domicile, even though temporarily absent, unless it has obtained a permanent situs elsewhere.[10] The rationale of this rule is that property such as a portable sawmill, a herd of cattle, or a stock of merchandise, is present in and receives protection under the laws of only one state.

2. The "home port" (owner's domicile) rule, initially involving ocean-going vessels and vessels operating on inland waters but later limited only to the former, is *not* applicable. Under this rule, the vessel is taxable at the owner's domicile[11] provided it has not acquired an actual situs elsewhere *by being used exclusively throughout the tax period* in another state or taxing jurisdiction.[12] The rationale of this rule is that the vessel's stay in port is a mere incident of its voyage.[13] The State Court erroneously applied this rule and its proof burden in the instant case.

3. The average unit rule of apportionment is applicable in the instant case. This rule is that "when a fleet of cars (or other types of transportation equipment) is *habitually* employed in *several* states—the individual cars constantly running in and out of each state—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in other States" and "when individual items of rolling stock are not continuously the same but are constantly changing as the nature of their use re-

[10] *Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905).

[11] *Ayer & Lord Tie v. Kentucky*, 202 U. S. 409, 26 S. Ct. 679 (1906).

[12] *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 S. Ct. 686 (1905).

[13] *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 75; 32 S. Ct. 13 (1911).

quires," each such state "may fix the tax (property) by reference to the average number of cars found to be habitually within its limits."

The basis of jurisdiction is the habitual employment of the property within the State and, by nature of that employment the property must bear its fair share of the burdens of taxation to which other property within the state is subject.

The rule is applicable to property taxation by the domiciliary and non-domiciliary state. Any reasonable formula related to time and use (mileage, gross rentals, arrival and departures, tonnage, and period of time) is used, in the case of non-domiciliary states, to determine the average number of units said to have a "permanent situs" within it[14] and, in the case of domiciliary states, to determine the average number of units said to have a "permanent situs" *without the state*[15] or the average number within such state.[16] In either case, the tax must have relation to the "opportunities, benefits or protection conferred or afforded by the laws of the taxing state."

When the property tax of a domiciliary state is at issue, it is not necessary, because of the habitual employment of the units of property in the several states, that taxpayer's proof establish the specific non-domiciliary states in which is located the average number of units having a permanent situs outside of the domiciliary state".[16]

The facts in the instant case require the application of the average unit rule of apportionment.

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[14] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

[15] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

[16] Cases cited in Note 15 and *Flying Tiger Line Inc. v. County of Los Angeles, (Cal.)* 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

Under the Operating Agreement, appellant's freight cars operated on regular routes and fixed schedules. This is the best evidence of habitual employment. In every such case, this Court has held that the average unit rule applied.[17]

Absence of fixed routes and regular schedules, lack of ownership of trackage and use of property by other than owner do not make the average unit rule inoperative in respect to the owner (tank and refrigerator car cases). The tests here are irregular routes but regular and continuous movement and habitual employment.

The parties have stipulated that appellant's freight cars under the Car Service and Per Diem Agreement were habitually, regularly and continuously employed at a per diem rental on the lines of other railroads, in, in and out, and out of, Pennsylvania. On the basis of this stipulation, a time and use formula, based on car days, determines that an average of 2189.30 of appellant's cars were habitually employed and had a situs outside of Pennsylvania as compared with an average of 440.57 cars in Pennsylvania.

The onus is on the domiciliary state (Pa.) to prove that its tax has been fairly apportioned and not on appellant to establish situs in specified non-domiciliary states. Even if appellant had such burden, it has been met (Brief, post, pp. 33-35, and Appendix B.)

The State Court in sustaining the unapportioned tax on appellant's freight cars committed two basic errors: (1) it relied solely on *New York Central and Hudson River Railroad Co. v. Miller*[18] and (2) it ruled that appellant's cars "which move irregularly and continuously about the country * * * do not attain the degree of continual and regularly scheduled presence which would enable other states, in accordance with due process, to tax them." (R. 215, 216). The *Miller* case involved the movement of rolling stock over

[17] Example—*Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

[18] 202 U. S. 584, 26 S. Ct. 714 (1906).

the railroad's own lines and the lines of other railroads outside of New York, the domiciliary state, whose unapportioned tax was sustained by application of the "home port" rule which required proof that specified units were present and employed outside the state throughout the entire tax period. This case was relied upon by Minnesota and this Court in *Northwest Airlines Inc. v. Minnesota*[19] but that case was subsequently modified or overruled in favor of the average unit rule.[20]

In respect to the second error, "the degree of continual and regularly scheduled presence" of appellant's freight cars in other states is precisely the same as in the tank and refrigerator car cases which sustained an apportioned tax by non-domiciliary states.[21]

An average of appellant's freight cars operated under the two Agreements, obtained a situs outside of Pennsylvania and, therefore, the unapportioned tax thereon, violates due process and it, also, violates the Commerce Clause because such average was exposed to multiple state taxation.

II. The unapportioned tax discriminates against appellant and is not cured by alleged valid classification based on the difference between railroads, having trackage only in Pennsylvania, and railroads having trackage outside Pennsylvania.

If, as held by the State Court, freight cars, while on the lines of using railroads outside of Pennsylvania under the two Agreements, did not acquire a tax situs apart from the owner's domicile and the domiciliary state has constitutional power to levy an unapportioned property tax thereon (R.

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[19] 322 U. S. 292, 64 S. Ct. 950 (1944).

[20] *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

[21] Examples—*American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, 349 P. 2d 746 (1959).

216), then the exercise of the power against appellant and the failure to exercise it against other owning railroads having trackage outside the state constitutes the very essence of discrimination under the Pennsylvania Tax statute, not only against appellant but against others similarly situated, and is not cured by the red herring of valid classification.

III. The issues presented raise substantial Federal questions and should be adjudicated.

The judgment of the State Court sustaining the unapportioned property tax is based upon a decision of this Court that is not applicable; it is contrary to the many decisions of this Court applying the average unit rule requiring apportionment of other types of transportation equipment such as pullman cars, tank cars, refrigerator cars, boats, barges and vessels operating on inland waters, and airplanes, under similar circumstances; it supports property taxation by a domiciliary state having no relation to opportunities, benefits, or protection conferred or afforded by its laws; it erodes settled legal principles vesting in the several states the power to levy a property tax on their fair share of tangible personalty physically present and habitually employed within their borders; and it confirms unapportioned property tax assessments under the Pennsylvania tax statute, which are believed to be discriminatory.

ARGUMENT

I

An Average Number of Appellant's Freight Cars Used Under the Operating Agreement and Under the Car Service and Per Diem Agreement Acquired a Situs Outside Pennsylvania or Were Used Habitually and Continuously in Pennsylvania and in Other States; And, Therefore, the Unapportioned Property Tax Assessed Thereon by Pennsylvania Violates the Due Process Provisions, and the Commerce Clause, of the Federal Constitution.

A brief discussion of the tangible property taxation rules will establish the rule or rules to be applied to determine situs and property tax liability in the instant case.

It is axiomatic that a taxing authority cannot tax property over which it has no jurisdiction. Such a tax would be unreasonable and would violate due process. The question of jurisdiction is a product of judicial decisions. The constitutional tests of a state's jurisdiction and power to tax under due process are physical presence, habitual use and correlative situs in the taxing state, viz. "whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state".[22]

A. General Tangible Property Rule and Principles.

In the case of real estate[23] and tangible property physically present in only one state or temporarily absent therefrom like a portable sawmill or herd of cattle—only the state in which the property is located has power to levy a property tax thereon. Here there is sole or substantial presence in, and protection afforded by, only one state.

[22] *Standard Oil Co. v. Peck*, 342 U. S. 382, 385, 72 S. Ct. 309 (1952); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174, 69 S. Ct. 432 (1949); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 202, 26 S. Ct. 36 (1905).

[23] *Senior v. Braden*, 295 U. S. 422, 55 S. Ct. 800 (1935).

Thus, tangible personalty located in another state cannot be taxed at the owner's domicile.[24] However, if it has no permanent location or correlative situs in another jurisdiction, it is taxable at the *owner's domicile*. This is the basis of the "home port" rule, viz., a ship engaged in interstate or foreign commerce on the high seas or coastal waters is taxable at the owner's domicile[25] provided it has not acquired an actual situs elsewhere by being used exclusively throughout the tax period in another state or taxing jurisdiction.[26] The rationale of this rule is explained in *Southern Pacific Co. v. Kentucky*[27] (p. 75) as follows:

> "It is one thing to find that a movable, such as a railway car, a stock of merchandise, or a herd of cattle, has become a part of the permanent mass of property in a particular state, and quite another to attribute to a seagoing ship an actual situs at any particular port into which it goes for supplies or repairs, or for the purpose of taking on or discharging cargo or passengers. A ship is not intended to stay in port but to navigate the seas. Its stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty as to result often in an entire escape from taxation."

Under the circumstances, the time of a vessel in a port or ports is insignificant compared to the time on the high seas or in coastal waters outside of any taxing jurisdiction. This differs from units of transportation equipment on land which are in one or more taxing jurisdictions *at all times*.

The "home port" rule as to vessels operating on the high

[24] *Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905).

[25] *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409, 26 S. Ct. 679 (1906).

[26] *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 S. Ct. 686 (1905).

[27] 222 U. S. 63, 75, 32 S. Ct. 13 (1911).

seas between foreign ports was applied recently[28] to the airplanes of foreign countries operating solely in foreign commerce and touching only one port of entry in the United States. The basis of the decision was that, as vessels which sails the seas are subject to admiralty law, airplanes flying international skies are subject to international aviation law, property taxation of the planes by a non-domiciliary country violates the Commerce Clause prohibiting state regulation of commerce in a field admitting only one uniform system, viz., property taxation by the domiciliary country which is not subject to review by the courts of the non-domiciliary country.

B. Average Unit Apportionment Rule and Related Principles

Migratory tangible property consisting of units of transportation equipment used in interstate commerce among the several states comes under a special rule. In 1891, this Court made a distinction between vessels in interstate commerce and railroad rolling stock similarly engaged.[29] In the *Pullman* case, it held that because pullman cars had no fixed situs and travel over land to, from and through the various states, they must be treated differently for the purpose of property taxation from ships which travel on international waterways, have a home port, and touch land only incidentally and temporarily. In this and subsequent cases, the average unit apportionment rule was developed and is concisely stated in *Johnson Oil Refining Co. v. Oklahoma*[30] at p. 162 as follows:

> "The basis of jurisdiction is the habitual employment of the property within the State. By nature of that em-

[28] *Scandinavian Airlines System Inc. v. County of Los Angeles*, 6 West's California Reporter 694, 14 Cal. Reporter 25, 363 P. 2d 25 (1961), cert. den. November 9, 1961 S. Ct. Docket No. 354.

[29] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891).

[30] 290 U. S. 158, 54 S. Ct. 152 (1933).

> ployment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is habitually employed in several states—the individual cars constantly running in and out of each State—it can not be said that any one of the States is entitled to tax the entire number of cars regardless of their use in other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits."

Under this rule, the constitutional basis of a state's power to tax, either domiciliary or non-domiciliary, is physical presence, habitual employment and "sufficiency of contact" in, or with, the taxing state producing a relation "between the tax and opportunities, benefits, or protection conferred or afforded by the taxing state."

Any formula which is related to time or use of the property within the state,[30] or to the benefits or protection conferred on the property, *is held to determine the average number of property units having a "permanent situs" within the state* unless the taxpayer's evidence establishes without apportionment the average number of such units.[31]

This rule requiring apportionment under due process has been applied to pullman cars,[32] refrigerator cars,[33] tank

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[30] *Union Tank Line Co. v. Wright*, 249 U. S. 275, 39 S. Ct. 276 (1919).

[31] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891).

[32] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

cars,[34] tow boats, barges and vessels operating on inland waters,[35] and to airplanes.[36]

A resume of these cases indicating whether the taxing state was a domiciliary or non-domiciliary state, the extent of use within the state, whether regular or irregular routes and schedules were involved, and the formula used, is as follows:

In the *Pullman* case, the pullman cars were run on fixed routes and regular schedules over railroad lines to, through and from Pennsylvania, the non-domiciliary state, which used mileage ratio apportionment.

In the *Hall* case, the lessee shippers used the owner's refrigerator cars *irregularly* but continuously on railroads running into, through and from Colorado (non-domiciliary). The owner had no office or place of business or other property in Colorado which used the mileage ratio apportionment tax the cars to the Illinois owner.

In the *Union Refrigerator* case, the lessee shippers took possession of the Kentucky owner's cars in Wisconsin and used them *irregularly* but continuously on railroads to, from, and through Kentucky, the domiciliary state and other states. The ratio of gross earnings was used to determine the average number used in, and taxable by, Kentucky (28, 29, 40 and 67 for 1897, 1898, 1899 and 1900 out of 2000 cars) and the average number having a "permanent situs" outside of Kentucky.

In the *Johnson Oil* case, the tank cars of the Illinois owner were used to make regular shipments (not regular sched-

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[34] *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933).

[35] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

[36] *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954); *Flying Tiger Lines Inc. v. County of Los Angeles (Cal.)*, 333 P. 2d 323 (1958) cert. den. 359 U. S. 1001.

II, of that Act (49 USCA § 1) requires such common carriers to interchange facilities and to establish through routes with other such carriers and reasonable rates applicable thereto, the purposes being to facilitate interstate traffic, to eliminate discrimination, and to provide reasonable transportation rates.[7] In the course of its regular business, appellant accepted shipments for continuous transportation to points in other states. Under the Operating agreement between appellant and CNJ (S. F, Par. 14, R. 50a; Exhibit A, R. 58a-65a) appellant's diesel locomotives and freight cars provided through freight service over its own lines in Pennsylvania and over the lines of CNJ in New Jersey. Under these circumstances, appellant was engaged substantially in interstate transportation even though its railroad lines were wholly within Pennsylvania;[8] and, also, its entire fleet of freight cars (3074) was substantially used in interstate commerce by way of interchange under the Car Service and Per Diem Agreement (S. F, Par. 15, R. 50a, 51a; Exhibits Y-2 to Y-5 inc. and Z, R. 131a-143a, R. 145a) on the lines of various other railroads in and out of Pennsylvania.

(2) *Appellant's freight cars run on fixed routes and regular schedules.*

Under the Operating Agreement, heretofore referred to, appellant's diesel locomotives and freight cars were run on fixed routes and regular schedules over its lines in Pennsylvania and over the lines of CNJ in New Jersey in order to provide through freight service.

The decisions of this Court[9] are unanimous in holding

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[7] *U. S. v. Pennsylvania R. Co.*, 323 U. S. 612, 65 S. Ct. 471 (1945).

[8] *Taylor v. Ecc*, 223 F. 2d 251, affirmed 353 U. S. 553, 77 S. Ct. 1037 (1956).

[9] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954); *Nashville, C. & St. Ry. v. Browning*, 310 U. S. 362, 60 S. Ct. 968 (1940).

ules) from its refinery in Oklahoma (non-domiciliary) to out of state purchasers. Mileage ratio apportionment was the measurement of Oklahoma's taxing power.

In the *Ott* case, the domiciliary situs rule (home port) of ocean going vessels was rejected in its application to vessels on inland waterways which were placed on the same tax apportionment basis as land transportation equipment. In this case, towboats and barges of several companies operating on the Mississippi River, *not on established routes and schedules*, stopped for relatively short periods of time (varying from $2^{2}/_{10}\%$ to $17^{1}/_{2}\%$ of total time) to load and unload in Louisiana (non-domiciliary) ports. The Louisiana tax was based on mileage ratio apportionment.

In the *Peck* case, the property tax of Ohio (domiciliary) levied upon the *full* value of boats and barges of an Ohio corporation not operating on regular routes and schedules on the Ohio and Mississippi Rivers was struck down and apportionment was required. There were no terminals in Ohio and the vessels stopped there occasionally for fuel and repairs. The distance of the waters traveled adjacent to Ohio was small in relation to total distance traveled and the vessels were almost continuously outside of Ohio.

In the *Braniff* case, a fleet of planes with home port in Minnesota was operated on regular routes and schedules in and out of Nebraska (non-domiciliary) which based its tax on apportionment ratio of arrivals and departures, revenue tons and originating revenue, within Nebraska.

In the *Flying Tiger* case, the property tax of California (domiciliary state for tax purposes) on the full value of planes was struck down and *time* apportionment was required. The planes were operated by the military in interstate and foreign commerce, not on regular routes and schedules, in the Pacific Air Lift during the Korean War to and from California, Guam and Japan, and were in California only one third of the time.

C. The Average Unit Apportionment Rule in its Application to Property Taxation by a Domiciliary State Has Been Refined and Extended

In the case of an owner of units of transportation equipment used in interstate commerce in the domiciliary and other states, the unit rule is applied to determine the average number of units having a permanent situs in, and taxable by, the non-domiciliary state. In taxation of such property by the domiciliary state it is assumed with certitude that the factors supporting jurisdiction to tax exist in the several states or two or more of them, viz; physical presence, habitual employment and sufficiency of contact, and that, therefore, property taxation by the domiciliary state must be apportioned to limit its tax to accord with "opportunities, benefits, or protection conferred or afforded" by its laws. Viewing the entire situation, each state is entitled to tax its portion of the interstate commerce to the extent of property used within its borders but the sum total of all apportioned taxes so levied by all states must not exceed one full ad valorem assessment. That is what this Court meant, predicated on due process, when it said in the *Peck* case (p. 385):

> "The rule which permits taxation by two or more states on an apportioned basis precludes taxation of all of the property by the state of domicile."

Under this refinement and extension of the average unit apportionment rule, the taxpayer is not required to prove that an average number of units has acquired a situs in specified non-domiciliary states and that such states have exercised the power to tax such units.[1] A concise statement

[1] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 195, 211, 26 S. Ct. 36 (1905); and Note 5 in Mr. Chief Justice Stone's dissenting opinion in *Northwest Airlines Inc. v. Minnesota*, 322 U. S. 292 at pp. 324, 325, 64 S. Ct. 950 (1944); *Standard Oil Co.*

of underlying principles is found in the *Scandinavian* case at pp. 701-2 (6 West's Cal. Reporter 694):

> "The rationale of these cases (Ott, Peck and Braniff) *is not based on the necessity to avoid double taxation* but, rather, on the recognition of the non-domiciliary state's right to fair compensation for the benefits and protection afforded the taxpayer. The power to tax flows from the *presence* of the property in the taxing state and the concomitant privileges enjoyed by its owners while thus employed within the jurisdiction. It is the unfairness of the original 'domicile' or 'permanent presence' doctrines as applied to transient carriers which prompted the present rule of apportionment. Surely, the older rules insured that no double tax would result, for only one jurisdiction could tax. Just as surely, the apportionment theory leads to the distinct possibility of double taxation through the utilization of different apportionment formulae. Thus, the *onus* of double taxation *falls*, not on the jurisdiction levying a fairly apportioned tax, but upon the *domiciliary jurisdiction which refused to apportion its taxes on the basis of benefits and protection actually conferred.*" (Emphasis supplied.)

This statement appears to be in harmony with sound principles of constitutional law.

D. Application of Settled Legal Principles as Discussed To the Facts in the Instant Case

(1) *Appellant and its fleet of freight cars constitute a component part of an integrated, interstate railroad system.*

Appellant was a common carrier subject to the provisions of the Interstate Commerce Act. Section 1, pars 4, 10 and

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v. Peck, 342 U. S. 382 at p. 386, 72 S. Ct. 309 (1952); *Flying Tiger Lines Inc. v. County of Los Angeles*, 333 P. 2d 323 at pp. 326, 331, 332, cert. den. 359 U. S. 1001, *Scandinavian Airlines System Inc. v. County of Los Angeles*, 6 West's Cal. Reporter 694, 701-2 14 Cal. Reporter 25, 363 P. 2d 25, 37 (1961), cert. den. November 9, 1961, S. Ct. Docket No. 354

Absence of regular routes and fixed schedules and instead, irregular but continuous movement and habitual employment of units of transportation equipment in the several states do not give jurisdiction to the domiciliary state to levy an unapportioned property tax thereon [46] nor do they deny to the non-domiciliary state the jurisdiction and power to levy an apportioned property tax thereon as in the case of tank cars,[47] refrigerator cars,[48] trucks[49] and boats and barges operating on inland waters.[50] There is no difference between use and employment of transportation equipment in those cases and use of appellant's freight cars under the Car Service and Per Diem Agreement in the instant case.

The crucial issue is whether a state's jurisdiction and power to tax meet the constitutional tests under due process, viz: physical presence, habitual employment and sufficiency of contact thereby producing the requisite relation between the tax and opportunities, benefits and protection conferred or afforded by the taxing state.

The predominant use and employment of appellant's fleet of 3074 freight cars under the Car Service and Per Diem Agreement were outside of Pennsylvania—71% of the time (ante, p. 8, items 4(b) and 5). On the basis of a time and use formula (car days), 365 car days is the equivalent of an average of *one* freight car. Under this formula, an average of 2189.30 (ante, p. 8, items 4b and 5) of appellant's freight cars was physically present and habitually employed outside of Pennsylvania under said Agreement as

[46] Cases cited in Note 37 herein.

[47] *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933).

[48] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, (Okla.), 349 P. 2d 746 (1959).

[49] *Area Auto Carriers, Inc. v. Bennett (Arkansas)*, 341 S.W. 2d 15 (1960) Reh. den. Jan. 9, 1961.

[50] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949).

compared with an average number of 440.57 cars in Pennsylvania. The car day formula is just as reasonable as the mileage apportionment ratio which has been approved by this Court and which was stated in *Oklahoma Tax Commission v. American Refrigerator Transit Company*[1] to "portray in a fair degree of accuracy the average amount" or number of cars used in the state.

The refinement and extension of the average unit rule of apportionment (discussed ante, pp. 27, 28) is applicable in the instant case where the facts establish physical presence and habitual employment in Pennsylvania and in other states. This rule was not considered by the state court and will no doubt be opposed by appellee. Under this rule, appellant's proof is not required to establish the average number of its freight cars having a situs in specified non-domiciliary states and that those states have exercised the power to tax such units (see cases cited in Note 37 herein). Instead, in these cases, correlative situs is considered and it is held that each state may tax its fair share of the use and employment of appellant's freight cars within its borders; that Pennsylvania's tax must be apportioned to accord with opportunities, benefits, or protection conferred or afforded by its laws; and that the jurisdiction and power of one or more non-domiciliary states to levy an apportioned tax precludes Pennsylvania, the domiciliary state, from levying an unapportioned property tax upon the *full* value of appellant's freight cars.

It cannot be disputed that in addition to physical presence and habitual employment, there is, also, sufficiency of contact on which to base an apportioned tax by one or more non-domiciliary states. Exhibit Y-5 to the Stipulation of Facts (S. F. Par. 15, R. 50a, 51a; Exhibit Y-5, R. 134a-143a) lists the names of railroads wholly outside of Pennsylvania and the number of car days appellant's freight cars were on the lines of each. For example, based on car days, an aver-

[1] 349 P. 2d 746 (1959).

age of 18.83 cars was on the lines of Long Island Railroad (wholly within state of New York); an average of 49.6 cars was on lines of New York, New Haven & Hartford Railroad; and an average of 58.5 cars was on the lines of Illinois Central Railroad. There is no doubt that New York state could tax the average of 18.83 wholly within its borders; and, as in the case of tank and refrigerator cars, each state through which the other two roads run could obtain necessary information from appellant to tax its proportion of average cars of 49.6 and 58.5.

Appellee will contend that appellant's proof is deficient in order to make applicable the average unit rule of apportionment because it does not establish average number of cars in specific non-domiciliary states. The answer is that this rule does not require such proof when a domiciliary state's property tax is at issue. A non-domiciliary state applies the rule to determine the average number of units having a "permanent situs" within its borders, but in the case of a domiciliary state the rule is applied to determine the average number of units having a "permanent situs" outside such state and which during the tax year did not receive "opportunities, benefits, or protection conferred or afforded" by the laws of the domiciliary state.[32] This applies the rule *alike* to domiciliary and non-domiciliary states to determine the proportion taxable by each.

Even if appellant is held to the degree or extent of proof for which appellee will contend, appellant has *in large part* met such burden of proof. The Record discloses the names of using railroads and the number of car days on each—in and out of Pennsylvania and wholly outside of Pennsylvania. (S. F. Par. 15, R. 50a, 51a; Exhibits Y-4 and Y-5, R. 133a-143a). Appendix B hereto lists the average number and value of freight cars on each such railroad where the car days exceed 4000—average cars 1417.32 and average value $5,115,221.64. If the time and use formula of car days

[32] Cases cited in Note 37 herein.

is reasonable, and it is,[3] then average cars of 1417.32 had a situs in the states where these railroads operated and each such state could have obtained the necessary information to tax its proportion of the average number physically present and habitually employed within its borders.

Furthermore, it is stipulated (S. F. Par. 17, R. 51a, 52a) that a detailed examination, study and review of its records by appellant and of reports made to it by using railroads for the month of March 1951 disclosed that 1024 cars were *at all times* on railroads wholly outside Pennsylvania, that 2049 cars were on roads operating in and out of Pennsylvania and that 1 car was on roads wholly in Pennsylvania and that such situation for the month of March represented the average use and employment of its freight cars for the entire year 1951.

Thus, the Record establishes that an average number of freight cars had obtained a situs in the states where the using railroads were operated, and that even under the "home port" or domiciliary situs rule a specific number (1024) was outside Pennsylvania throughout the entire year 1951.

Therefore, appellant submits that Pennsylvania's unapportioned property tax violates due process; and that, because appellant's freight cars are exposed to multiple state taxation, it, also, violates the Commerce Clause.

The State Court ruled (R. 213) that appellant's "freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and regular schedules, do not, *although a certain average number may be present in another state*, acquire a tax situs outside the domiciliary state." (Emphasis supplied.) This ruling is clearly contrary to the decisions of this court[4] requiring apportionment of transportation equipment used

[3] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

[4] Cases cited in Note 3 herein.

in several states because in order for an average number "to be present in another state", there had to exist physical presence and habitual employment in such other state.

In reliance solely on the decision of this Court in *New York Central Railroad and Hudson River Co. v. Miller*,[1] the state court ruled further (R. 215, 216) that appellant's freight cars "which move irregularly and continuously about the country, being used interchangeably by other railroads while serving many shippers before returning to the state of domicile, do not attain the degree of continual and regularly scheduled presence which would enable other states, in accordance with due process, to tax them".

As indicated heretofore (ante, p. 13), the *Miller* case applied the domiciliary situs or "home port" rule applicable to ocean going vessels, under which situs of movable tangible property was held to be in the state of the owner's domicile unless actual situs was established by proof of physical presence and use in another state or jurisdiction *throughout the entire tax period*. The *Miller* case was relied upon by the state of Minnesota and by this Court in *Northwest Airlines Inc. v. Minnesota*[2] to support an unapportioned property tax by Minnesota, the domiciliary state, upon a fleet of airplanes used and employed on regular routes and schedules in Minnesota and six other northwestern states. But that decision was subsequently modified or overruled by subsequent decisions of this Court in favor of the average unit rule of apportionment or under this rule as refined and extended.[3]

Although the state court recognized such modification (R. 215), it nevertheless proceeded to apply the rule of the *Miller* case to the instant case. In the *Miller* case, the rail-

[1] 202 U. S. 584, 26 S. Ct. 714 (1906).

[2] 322 U. S. 292, 64 S. Ct. 950 (1944).

[3] *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954); *Flying Tiger Lines Inc. v. County of Los Angeles*, (Calif.), 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

road challenged the unapportioned property tax assessed by New York, the domiciliary state, upon its rolling stock used on its own lines in and out of New York and on the lines of other railroads outside of New York. The taxpayer presented evidence establishing *its own* road mileage in and out of New York and the car mileage in and out of New York over its own lines and the lines of other railroads to show "that a certain proportion of its cars, although not the same cars, was continuously without the state during the whole tax year." This Court upheld the unapportioned tax on the ground that there was no showing that "some specific portion of the corporate property is outside of the state *during the whole tax year*".

Other decisions of this Court conclusively establish that the rule of the *Miller* case is no longer followed and that under the facts in that case the average unit rule of apportionment or the refinement and extension thereof is held to establish the average number of units having a "permanent situs" in a non-domiciliary state [7] or the average number of units which are beyond the jurisdiction and taxing power of the domiciliary state [8].

Therefore, appellant submits that the state court erred in relying upon and applying the *Miller* case in sustaining the Pennsylvania's unapportioned tax in the instant case.

Some additional arguments which appellee will no doubt advance to support the state court's judgment sustaining the unapportioned tax, although not relied upon by the state court itself, and appellant's answers thereto, are as follows:

1. Appellee will argue that Pennsylvania, as the domiciliary state, has a special standing to levy an unappor-

[7] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

[8] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

tioned property tax on appellant's freight cars. Such argument is without foundation.

The constitutional tests of a state's power and jurisdiction to levy a property tax under due process must be based upon actual physical presence and habitual employment and use of the property in, and sufficiency of contact of the property with, the taxing state—all of which is the equivalent of situs. Since, in the instant case, non-domiciliary states have jurisdiction and power to levy an apportioned property tax on appellant's freight cars, Pennsylvania, the domiciliary state, is precluded from levying an unapportioned property tax thereon. Moreover, such an unapportioned tax has no relation to the opportunities, benefits, or protection conferred or afforded by Pennsylvania's laws and, therefore, appellant's property is exposed to multiple state taxation in violation of the Commerce Clause. Both of these principles negative any special standing of Pennsylvania, as the domiciliary state, to levy an unapportioned property tax on appellant's freight cars.

2. Appellee will argue that since appellant is not qualified to do business in other states and no property or other taxes are paid by appellant on its freight cars to other states (S. F. Par. 12, R. 49a), the unapportioned property tax assessed by Pennsylvania thereon does not violate due process.

Mr. Chief Justice *Stone* in his dissenting opinion in *Northwest Airlines Inc. v. Minnesota*[*] (p. 326) has completely demolished this argument. The extent to which Pennsylvania may constitutionally tax does not depend upon what other states may happen to do, but upon what Pennsylvania has constitutional power to do; and, as we have shown, Pennsylvania does not have constitutional power to assess an unapportioned property tax on appellant's freight cars. Furthermore, the levying of a valid property tax by a state upon properly physically present

[*] 322 U. S. 292, 64 S. Ct. 950 (1944).

and habitually used therein is not conditioned upon qualification to do business and the doing of business by the property owner in the taxing state.[61]

II

Appellant Is Discriminated Against When Tax Apportionment Is Denied to it But Is Allowed to Other Railroads for Freight Cars While on the Lines of Using Railroads Outside of Pennsylvania Under the Car Service and Per Diem Agreement.

The parties have stipulated (S. F. Par. 25, R. 54a, 55a) that tax apportionment for freight cars while on the lines of using railroads outside of Pennsylvania under the Car Service and Per Diem Agreement, denied to appellant, has been allowed to other railroads.

The state court denied appellant's contention of discrimination on the ground that valid classification could be made between appellant having no trackage outside the state, and other railroads having trackage outside the state, who were allowed apportionment (R. 216).

Appellant failed to include in its claim of discrimination its freight cars run on fixed routes and regular schedules. Clearly, as to them, there is discrimination.[62]

If, as held by the state court, freight cars while on the lines of using railroads outside of Pennsylvania under the Car Service and Per Diem Agreement, did not acquire a tax situs apart from the owner's domicile and the domiciliary state had constitutional power to levy an unapportioned property tax thereon (R. 216), then the exercise of this power against appellant and the failure to exercise it against other owning railroads having trackage outside the

[61] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, 349 P. 2d 746 (1959).

[62] Cf.: *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891).

state constitutes the very essence of discrimination which is not cured by the red herring of valid classification.

In *New York Central and Hudson River Railroad Co.*,[54] relied upon by the state court in holding that appellant's freight cars had not obtained a situs outside of Pennsylvania, the fact that the taxpayer railroad had trackage outside the domiciliary state of New York was not considered sufficient to require apportionment.

Appellant submits that the burdens and liabilities are not imposed against other railroads in the same situation as appellant and that, therefore, the unapportioned tax on appellant's freight cars violates the equal protection of the laws provisions of the Federal Constitution.[55]

III

The Questions Presented Should Be Adjudicated by the Court.

In its Order of November 13, 1961, this Court postponed jurisdictional question to hearing on the merits.

The judgment of the State Court sustaining the unapportioned property tax on appellant's freight cars run on fixed routes and regular schedules is contrary to every decision of this Court requiring apportionment under the same circumstances.

The judgment of the State Court sustaining the unapportioned property tax on appellant's fleet of freight cars physically present and habitually used in the domiciliary state and various other states is based upon a decision of this Court[56] which does not reflect the current constitutional tests of a state's power and jurisdiction to assess property taxes and is contrary to the decisions of this Court

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[54] 202 U. S. 584, 26 S. Ct. 714 (1906).

[55] *Atchison, Topeka and Santa Fe Railroad Co. v. Matthews*, 174 U. S. 96, 104, 19 S. Ct. 609 (1899).

[56] *New York Central and Hudson River Railroad Co. v. Miller*, 202 U. S. 584, 26 S. Ct. 714 (1906).

requiring apportionment under similar circumstances of other types of transportation equipment such as pullman cars, tank cars, refrigerator cars, boats, barges, and vessels operating in inland waters and airplanes[56]. This judgment of the State Court brings to issue the extent of immunity of such types of transportation equipment from property taxation by the domiciliary state and the settled legal principles vesting in the several states the power to levy a property tax on their fair share of tangible personalty physically present and habitually employed within their borders.

Furthermore, there appears to be a conflict in state court decisions. In *Flying Tiger Lines Inc. v. County of Los Angeles* (Cal.)[57], the domiciliary state was limited to an apportioned property tax. In *Commonwealth of Kentucky v. Union Pacific Railroad Co.*[58], the non-domiciliary state, in a situation similar to the instant case, was denied the right to levy an apportioned property tax but in *Oklahoma Tax Commission v. American Refrigerator Transit Co.*[59] and in *Arco Auto Carriers, Inc. v. Bennet (Arkansas)*[60], the right of the non-domiciliary state to levy an apportioned property tax was upheld. The Kentucky case was the subject of strong criticism in 49 A.L.R. 1103. This case tends to support, but the California, Oklahoma and Arkansas cases are diametrically opposed to, the state court's judgment in the instant case.

The object and intent of the Pennsylvania Tax Statute (Appendix A) is to levy a property tax on all property of domestic corporations except that "permanently" located outside the state. The constitutional power to tax or not to tax may not be based upon an alleged classification which is not reasonably related to the purpose of the Tax Statute. Discrimination resulting against appellant and other tax-

[56] Cases cited in Notes 3 and 7 herein.
[57] 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.
[58] 214 Ky. 339, 283 S.W. 119 (1926).
[59] 349 P. 2d 746 (1959).
[60] 341 S.W. 2d 15 (1960); reh. den. Jan. 9, 1961.

payers similarly situated under the Pennsylvania Statute as construed should be eliminated and discrimination against taxpayers under similar construction of tax statutes generally should be discouraged.

These considerations demonstrate that the validity of the Pennsylvania Statute and other statutes similarly construed is not academic or episodic; that the issues involved are of general constitutional dimensions; and that the questions presented are so substantial as to require plenary consideration on the merits.

IV

CONCLUSION

On the basis of legal principles and their application to the facts in the instant case as discussed, appellant respectfully submits:

1. That the issues presented raise substantial federal questions which should be adjudicated by this Court.

2. That the judgment of the state court sustaining the unapportioned property tax on appellant's freight cars run under the Operating Agreement on regular routes and fixed schedules over lines in and out of Pennsylvania should be reversed on the grounds that it violates the due process of the laws provisions, and the Commerce Clause, of the Federal Constitution.

3. That the judgment of the State Court sustaining the unapportioned property tax on appellant's freight cars run under the Car Service and Per Diem Agreement regularly, habitually and continuously on the lines of other railroads operating in, in and out, or outside of Pennsylvania should be reversed on the ground that it violates the due process of the laws provisions, and the Commerce Clause, of the Federal Constitution; but, in the event that additional evidence is necessary to determine whether an average num-

ber of freight cars has acquired a situs in specific non-domiciliary states, the case should be remanded to the State Court for such purpose.

4. That the judgment of the State Court sustaining the unapportioned property tax assessment on appellant's freight cars should be reversed in its entirety on the ground that said assessment discriminates against appellant.

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APPENDIX A.

TEXT OF PENNSYLVANIA STATUTES INVOLVED.

Section 20 of the Act of June 1, 1889, P. L. 420, as Amended by the Act of May 16, 1945, P. L. 606, 72 Purdon's Pennsylvania Statutes § 1901.

Section 20. That hereafter, * * *, it shall be the duty of every corporation having capital stock, * * *, now or hereafter organized or incorporated by our under any laws of this Commonwealth, and of every corporation, * * *, now or hereafter incorporated or organized by or under any law of any other State, * * *, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth, * * * to make annually on or before the fifteenth day of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by it, setting forth, in addition to any other information required by the Department of Revenue:

* * * * * * *

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and the value of the same; and the value of the property, if any, exempt from taxation.

Sixth. A valuation and appraisal * * * of the capital stock of said corporation * * at its actual value in cash as it existed at the close of the year for which the report is made.

Section 21(a) of the Act of June 1, 1889, P. L. 420, as Amended by the Act of May 29, 1951, P. L. 462, 72 Purdon's Pennsylvania Statutes § 1871.

Section 21(a). That every domestic corporation * * * from which a report is required under the twentieth section hereof, shall be subject to, * * * a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, * * * as ascertained in the manner prescribed in said twentieth section: * * *.

Section 1 of the Act of June 22, 1931, P. L. 685, 72 Purdon's Pennsylvania Statutes § 1896.

Section 1. Whenever any corporation * * * subject to tax upon its capital stock imposed by and under the laws of this Commonwealth, owns assets which are exempted or relieved from the capital stock tax under the laws of this Commonwealth, the proportion of the capital stock exempted or relieved from the capital stock tax, by reason of the ownership of such assets, shall be the proportion which the value of such assets bears to the value of the total assets owned by such corporation * * *.

APPENDIX B

Average Cars and Average Value Thereof on Railroad Lines In and Outside, or Outside, Pennsylvania Where Car Days Exceed 4000 on Each Line.

	Cars Days	*Average Value*	*Average Cars*
Reading Company	49,733	$4,553,256.62	136.25
Baltimore & Ohio	10,554	96,187.05	28.92
Erie R. R. Co.	5,389	49,114.27	14.76
D. L. & W.	4,023	36,665.82	11.02
Pennsylvania R. R.	45,243	412,335.65	123.95
New York Central	6,764	61,645.74	18.53
Lehigh & New England	4,402	40,118.95	12.06
Lehigh Valley	6,166	56,195.69	16.89
Western Maryland	4,846	43,311.42	13.02
Atchison, Topeka & Santa Fe	20,300	185,064.82	55.61
Atlantic Coast Line R. R. Co.	15,334	139,751.01	42.01
Boston & Maine R. R. Co.	9,105	82,981.15	24.94
Canadian National Railways	19,507	177,782.90	53.44
Canadian Pacific Railway	11,048	100,157.54	31.91
Central of Georgia Railway	4,478	40,811.60	12.27
Chesapeake & Ohio Rwy. C. & O. Dist.	8,866	80,802.95	24.29
Chesapeake & Ohio Rwy. Pere Marq. Dist.	5,765	52,541.05	15.79
Chicago & Northwestern Rwy.	19,068	173,750.22	52.24
Chicago, Burlington & Quincy R. R.	14,248	129,853.42	39.03
Chicago, Milwaukee, St. P. & Pac. R. R.	21,672	197,514.27	59.38
Chicago, Rock Island & Pacific R. R.	14,189	129,315.71	38.87
Elgin, Joliet & Eastern R. R.	10,579	96,414.89	28.98
Grand Trunk Railway System (W. L.)	6,369	58,045.79	17.45
Great Northern Railway	9,653	87,975.51	26.47
Gulf, Mobile & Ohio R. R.	7,562	68,918.56	20.71
Illinois Central Railroad	21,412	195,144.69	58.66
Indiana Harbor Belt Railroad	7,797	71,060.30	21.36
Louisville & Nashville R. R.	12,574	114,596.92	34.45
Long Island Railroad	6,872	62,630.03	18.83
Minneapolis, St. P. & Ste. Marie Rwy.	4,923	44,867.24	13.49
Missouri-Kansas-Texas R. R.	4,695	42,789.29	12.86
Missouri Pacific R. R. (Trustee)	13,343	121,605.43	36.55
New York, Chicago & St. Louis R. R.	17,088	155,736.61	46.82
New York, New Haven & Hartford R. R.	18,124	165,178.51	49.65
Norfolk & Western Railway	6,094	55,551.50	16.70
Northern Pacific Railway	8,438	76,902.24	23.12
St. Louis-San Francisco Railway (Trustee)	8,159	74,359.49	22.35
Seaboard Air Line R. R.	12,886	117,440.43	35.30
Southern Railway System	26,762	243,963.52	73.32
Southern Pacific Co. Pacific System	17,715	161,456.97	48.54
Terminal R. R. Ass'n of St. Louis	4,414	41,228.31	12.09
Texas and New Orleans R. R.	8,997	81,996.86	24.62
Texas & Pacific Railway	4,539	41,367.54	12.43
Union Pacific System	16,033	146,121.56	43.92
Wabash Railroad	4,311	39,289.59	11.81
TOTAL	521,245	$5,125,221.66	1417.32